No. 14,942

United States Court of Appeals

For the Ninth Circuit

WILLIAM R. RUSSELL,	*Appellant,*
VS.	
WILLIAM CUNNINGHAM,	*Appellee.*

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

Appellant in his brief has cited no authority for appeal to this Court. Appellee contends that he is under no duty to supply jurisdictional statements for appellant, and that this appeal should be dismissed for lack of jurisdiction.

STATUTES AND RULES INVOLVED.

Rule 18—Court of Appeals for the Ninth Circuit.

1. Counsel for the appellant shall file with the clerk of this Court 20 copies of a printed brief, and serve upon counsel for the appellant three copies thereof, within 30 days after the clerk has mailed to him copies of the printed record.

2. This brief shall contain, in order here stated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases, alphabetically arranged, with citation to the official reports and National Reporter system, textbooks, statutes, treaties, regulations and rules cited, with references to the page where they are cited.

(b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree or order in question. The statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, (2) to any treaty of the United States or statute, the validity of which is involved (giving the volume and page where the treaty or statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear.

(c) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(d) In all cases a specification of errors relied upon which shall be numbered and shall set our separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or re-

jected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the Court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the Court upon such exception.

(e) A concise argument of the case (preferably preceded by a summary), exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point. When a statute, treaty, regulations or rules is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. If the matter so to be quoted, or matter quoted from opinions, is long it may be set out in an appendix. Except after leave granted, the clerk will not receive a brief of either party which, exclusive of the appendix, is more than eighty pages, or a reply brief of more than twenty.

3. Counsel for an appellee shall file with the clerk 20 copies of a printed brief, and serve upon counsel for the appellant three copies thereof, within 30 days after receipt of copies of the appellant's brief. His

brief shall be of like character with that required of the appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the appellant is controverted.

4. Counsel for the appellant may serve and file within 10 days after receipt of copies of appellee's brief, 20 printed copies of a reply brief.

5. In cases appealed from the District Courts of Alaska, Hawaii and Guam, and Supreme Court of the Territory of Hawaii, the clerk of this Court shall fix the time within which briefs as mentioned in this rule shall be served and filed.

6. When the cause is prosecuted or defended in forma pauperis, or a party is permitted to proceed on a typewritten brief, the party so circumstanced shall file his brief, which may be in typewritten form, upon a letter size paper, 8 inches by 10½ inches bound on the left margin. An original, and three *clearly legible and unblurred* copies must be filed, and, in accordance with the other provisions of this rule.

7. When the brief for appellant is not filed as required by rule, the clerk shall give notice to counsel for both parties that the matter will be called to the attention of the Court on a day certain, for such action as the Court deems proper, and the case may be dismissed. When, according to this rule, an appellant is otherwise in default, the case may be dismissed on motion; and when an appellee is in default he will not be heard, except on consent of his adversary or by request of the Court.

Rule 41(a)(2) and 41(b) Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of Court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 54(d) Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the Court.

Rule 10, District Court of Guam. Security for Costs.

(a) *By Nonresident.* In every action in which there is a plaintiff who is not a resident of this district, there shall be filed with the complaint, and in every action removed from the Island Court to this Court by a party who is not a resident of this district, there shall be filed with the record on removal, a bond for costs in the sum of $250.00 unless the Court on motion, which may be made ex parte, and for cause shown, dispenses with the bond or fixes a different amount. The bond shall have sufficient surety and shall be conditioned to secure the payment of all fees that must by law be paid by the nonresident parties to the clerk, marshal, or other officer of the Court, and all costs of the action which they must ultimately be required to pay to any other party. If a bond in the sum of $250.00 is filed, no approval thereof is necessary. After the bond has

been filed, any opposing party may raise objection to its form or to the sufficiency of the surety for determination by the clerk. If the bond is not filed within the time specified, or if the bond filed is found insufficient, the Court may order that a sufficient bond be filed within a specified time and if the order is not complied with, the clerk shall dismiss the action as of course for want of prosecution.

(b) *By Other Parties.* The Court, on motion of its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as the Court by its order may designate.

(d) *Suits as Poor Persons.* At the time application is made for suits by poor persons for leave to commence any civil action without being required to repay fees and costs or give security for them, the applicant shall file a written consent that the recovery, if any, in the action, to such amount as the Court may direct, shall be paid to the clerk who may pay therefrom all unpaid fees and costs taxed against the plaintiff and to his attorney, the amount which the Court allows or approves as compensation for the attorney's services.

STATEMENT OF THE CASE.

Appellant is requesting a declaration from this Court that the District Court of Guam committed a gross abuse of discretion by its orders denying appellant a continuance or dismissal without prejudice and

ordering a dismissal with prejudice for lack of prosecution.

The alleged cause of action was for bodily injury incurred on April 11, 1954. A complaint sounding in assault was filed in the District Court of Guam on April 26, 1954. Defendant Cunningham timely answered on May 15, 1954, denying the allegations of the complaint and alleging self-defense.

On June 4, 1954, a pre-trial order was filed setting forth the issues to be tried, the witnesses expected of each party, and setting the action for trial on August 2, 1954. On motion of plaintiff's counsel, the action was continued and set for second time on May 3, 1955. Pursuant to a subsequent motion by plaintiff another continuance was granted on April 19, 1955, and the action was set for trial on the third date of August 15, 1955. The second paragraph of this April 19, 1955, order states,

> "The plaintiff will be expected to be present at that time to testify in person or to testify by deposition, since this order assumes at the present time that further continuance will not be granted.

On or about August 12, 1955, plaintiff moved again for a continuance, or in the alternative, a dismissal without prejudice. This motion was denied. On August 15, 1955, the same motion was orally presented and argued to the Court. It was denied. Plaintiff's counsel then stated that he was unable to proceed to trial in the absence of plaintiff. Proceeding under Rule 41(b), Federal Rules of Civil Procedure, de-

fendant thereupon moved for a dismissal of the action with prejudice. This motion was granted.

On April 1, 1955, and April 11, 1955, plaintiff had commenced two separate actions in the United States District Court for the Northern District of California, Southern Division, naming, *inter alia,* appellee Cunningham as defendant therein. On August 2, 1955, plaintiff had instituted a similar action in the Superior Court in and for the City and County of San Francisco. These actions were substantially the same as the action commenced in Guam. Service was made on appellee while he was taking a vacation in California.

Defendant had incurred the costs and expenses normally incident to a defense against such actions and stood prepared and ready to go to trial in Guam at any time.

ISSUES PRESENTED.

1. Should this appeal be dismissed by reason of the flagrant disregard by counsel for appellant of Rule 18 of this Court, relative to briefs?

2. Did the District Court of Guam grossly abuse its discretion by denying plaintiff's motion for a continuance and for a dismissal without prejudice?

3. Did the District Court of Guam grossly abuse its discretion by granting defendant's motion for dismissal with prejudice?

4. Is the requirement that non-residents commencing an action in Guam post a cost bond, and the granting of costs, improper?

SUMMARY OF ARGUMENT.

It is the contention of appellees that

a. This appeal should be dismissed by reason of the flagrant disregard of counsel for the appellant of Rule 18 pertaining to the requirements of this Court in the filing of briefs.

b. That it was within the sound discretion of the Court to refuse to grant further continuance or to dismiss this action without prejudice on August 15, 1955, and that the Court had before it ample evidence upon which to base its decision.

c. That it was within the sound discretion of the Court to grant defendant's motion for dismissal with prejudice on August 15, 1954, and there is ample substantiation in the record for this decision.

d. That it was not discriminatory to require a cost bond nor to grant costs including fees for taking of deposition to the defendant.

ARGUMENT.

I. APPEAL SHOULD BE DISMISSED.

Rule 18 (6) of the United States Court of Appeals for the Ninth Circuit provides, in essence, that briefs in forma pauperis must be filed in accordance with all of the provisions of the rule. Paragraph 18 (2) requires that briefs shall contain, in the order stated,

(a) A subject index . . . and a table of cases . . . with citations.

(b) A statement of the pleadings and facts disclosing the basis . . . of jurisdiction . . . The statement shall refer *distinctly* to statutory provisions . . . and pleadings.

(c) A concise abstract or statement of the case, presenting *succinctly* the questions involved . . .

(d) A specification of errors.

(e) A *concise* argument of the case. (Italics supplied in above rule.)

It is initially submitted that the brief served on appellee in this case is in flagrant disregard of the above rules. It contains no subject index, no table of cases. It contains no statement of pleading or statutory enactments giving this Court jurisdiction on appeal. And primarily, it contains no *concise* abstract of the case. Instead, twenty-two valuable pages are utilized to present an emotional, biased and unsupported statement of purported facts. There are unverified statements (App. Brief pp. 1, 9, 19) alleging that the trial judge made certain remarks and failed to live up to them—and more basic, the implication that the Judge would have decided an issue at an airport after a few minutes conversation, instead of (as actually happened) a decision in Court after presentation of evidence and argument. Many hundreds of words are used to discuss issues not before this Court (e.g. "Cunningham's Assault was Unprovoked," pp. 3, 4, 5, App. Brief). Much time is spent (pp. 6, 9, 11, thru 17, 21) reciting a purported failure of communication between appellant, appellant's San Francisco counsel (Mr. Lawrence) and appellant's Guam counsel, Mr.

Duffy. Several pages are used to state why "August 9, 1955, was too Late to Prepare for Trial" (App. Brief pp. 13, 14, 15, 16, 17) although little is said about the many months before that. It should also be pointed out that what purports to be the argument (App. Brief pp. 23-36) is really an amplification of unverified facts. Appellee respectfully contends that wanton abuse of the Rules of Court merits censure and dismissal of the appeal.

II. THE DISTRICT COURT OF GUAM DID NOT ABUSE ITS DISCRETION GROSSLY OR OTHERWISE BY DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE OR FOR A DISMISSAL WITHOUT PREJUDICE UNDER RULE 41(a)(2).

"As the rules governing the exercise of the trial Court's discretion as to the granting or denying of a motion for continuance or a motion for voluntary dismissal without prejudice are the same, the law applicable to both motions will be considered together."

U. S. v. Pacific Fruit & Produce Co., 138 Fed. 2d 367.

Courts have, as an incident to their power to hear and determine causes, the power to grant dismissals or continuances. The fundamental principle running throughout all the cases on this subject is that the granting, or refusal of a court to grant dismissals or continuances, rests in the sound discretion of the Court to which application is made.

Armour & Co. v. Kohlmeyer, 161 Fed 78.

Requests for continuance are usually made on the basis that a party should have a reasonable oppor-

tunity to try the cause upon its merits, but any right thereto must be balanced by a co-relative duty placed upon the plaintiff as indicated in *U. S. v. Pacific Fruit & Produce Co. (supra)* at 372:

> "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination."

As will be pointed out more fully in Section III of this argument, the District Court of Guam had before it ample evidence to indicate that the plaintiff below had failed to use diligence and to expedite his case. Good faith is an essential element in seeking a dismissal, continuance, or any dilatory order. Hence, if there are circumstances casting suspicion upon the good faith of the applicant, a motion for continuance or voluntary dismissal should be denied. In this case, the affidavit supporting the motions of August 10, 1955, and August 15, 1955, stated that Russell was out of funds and in the hospital at San Francisco. But a memorandum filed August 15, 1955, from the Master of the ship upon which Russell was employed (see transcript of record) stated that Russell had worked continuously from May 16, 1955, to August 10, 1955, save for eight hours sick leave on August 9, 1955. Upon this information and the additional facts that plaintiff had been warned on April 19, 1955, that no further continuances were likely to be granted, that he would be expected to go to trial in August and furthermore that plaintiff was represented by counsel at all times on Guam and at the hearings on all motions, the District Court of Guam formed a "well

founded belief" that the motions made were merely delaying tactics.

It should also be pointed out that as of August 15, 1955, the defendant in the case below had been subjected to extremely heavy expenses in defending not only the action on Guam, but three other similar actions filed by the same plaintiff in the State of California.

It has been held in *U. S. v. Du Pont,* (N.D. of Ill. 1953) 13 FRD 490, at 497, that a Court can generally grant a dismissal without prejudice, conditioned upon the plaintiff's paying defendant's costs, but it was also held in the *Du Pont* case that since the government was the plaintiff, no dismissal could be granted as the Court was without authority to order costs against the United States and defendant could not be protected therefrom. Such reasoning should certainly apply to any order here granting a dismissal and requiring the plaintiff to pay the defendant's costs. As a practical matter this would be a nullity since the plaintiff had alleged himself on numerous occasions to be a pauper and unable to pay even his own costs. For the Court to have granted a judgment for costs would have been of no effect, as said by the Court in *Homeowners Loan Corporation v. Hoffmann,* 134 Fed. 2d 314:

> "The plaintiff contends that the defendant's right to payment of costs by the plaintiff is satisfied by the judgment for costs entered . . . This contention is of no merit. A judgment is not equivalent to payment."

In fact, it could easily be said that granting of the motion under circumstances such as these would in itself have been a gross abuse of discretion.

Appellant has indicated in his brief that under the ruling of *Bolton v. General Motors Corporation,* 180 Fed. 2d 379, that there is an absolute right to dismissal without prejudice under Rule 41(a)(2) FRCP. As indicated in *U. S. v. Du Pont, supra,* this was a minority ruling, contrary to the great weight of authority, peculiar only to the Seventh Circuit. The point is now of no more than historical moment as the Bolton Rule has been expressly overruled in *Grivas v. Parmalee Transporation Co.,* 7th Circuit, 1953, 207 Fed. 2d 334, Certiorari denied, 347 U.S. 913, 74 Supreme Court 477.

It is submitted that a refusal to grant the motion for dismissal without prejudice on August 15, 1955, was amply supported by the evidence and that granting of such motion would have been prejudicial to a defendant who had expended large sums of money for his defense and was at all times ready, willing and able to proceed with the action.

III. THE DISTRICT COURT OF GUAM DID NOT ABUSE ITS DISCRETION BY ORDERING A DISMISSAL WITH PREJUDICE UNDER RULE 41(b).

A. Federal courts have consistently held that it is within the sound discretion of the trial Court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with rea-

sonable diligence. This power of dismissal for lack of prosecution rests in the inherent powers of the Court and is expressly conferred by Rule 41(b) of the Federal Rules of Civil Procedure.

Barger v. Baltimore & Ohio Railroad, 130 Fed. 2d 401;

Shotkin v. Westinghouse Electric Co., 169 Fed. 2d 825;

Hicks v. Beacon's Moving & Storage Co., 115 Fed. 2d 406;

U. S. v. Pacific Fruit & Produce Co., 138 Fed. 2d 367.

This statement of the law has been very recently affirmed by this circuit in *Eva Rose Boling v. United States of America,* Action No. 14727, 9th CCA decided January 23, 1956. The opinion states:

> "The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystalized by rule."

It then discusses at some length the hesitancy of Courts to act under this rule, and concludes its discussion of the law with the statement:

> ". . . an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed."

The Ninth Circuit has also determined that this abuse of discretion must be a gross abuse. In one of the leading cases on this subject, *Hicks v. Beacon's Moving & Storage Co., supra,* the Court has held at page 409:

> "Unless it is made to appear that there has been a gross abuse of discretion by the trial court in dismissing an action for lack of prosecution, its decision will not disturbed on appeal."

Or, as stated in *U. S. v. Pacific Fruit & Produce Co., supra:*

> "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination and unless it is made to appear that there has been a *gross* abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution, its decision will not be disturbed on appeal." (Italics supplied.)

What then was the record which was before the Court at the time that it granted the dismissal with prejudice on August 15, 1955? The judgment roll indicates that the following evidence and information substantiated the ruling of the Court:

a. The pretrial order of June 4, 1954, wherein appellant stated that the witnesses for the plaintiff and plaintiff himself would testify by deposition.

b. The order for continuance of April 19, 1955, wherein plaintiff was notified to be present in person or by deposition on August 15, 1955.

c. The letter to Judge Shriver from counsel Lawrence and the telegram upon which the affidavit for motion of continuance was based, dated August 9, 1955, which stated that plaintiff Russell was in the hospital and plainly inferred that plaintiff could not be physically present. This telegram, letter and infer-

ence were directly refuted by a memorandum filed August 15, 1955, from the Master of the USNS Fred C. Ainsworth reporting that Russell was gainfully employed from May 16, 1955, to August 10, 1955, and during this period had been on sick leave for only eight hours on August 9, 1955.

It should be particularly pointed out that the plaintiff below had been represented by counsel on Guam at all stages of the proceedings. The appellant now seeks in his brief to perfect his appeal to some degree upon a purported lack of action by or confidence in counsel on Guam. It should be noted (as indicated in Section I of the argument) that appellant's brief on this point, pages 3 to 21, is for the most part completely outside the record. The trial Court had before it an affidavit dated April 13, 1955, in support of its motion for continuance from May 3, 1955, to August, which set forth substantially the same reasons for continuance that appellant urged in August. The Court by its order on April 19, 1955, amply warned the plaintiff that he would be required to proceed to trial four months later. The record and appellant's brief indicate that the appellant was present and had sufficient funds for the taking of lengthy depositions in San Francisco on April 15 and 18 of 1955. The record indicates that the appellant was well aware that he would be on Guam on June 21, 1955, having sailed from San Francisco on June 3. It was obvious to the Court that no action was taken by the plaintiff below to make prior contact with his counsel who was present on Guam, the defendant who was present on

Guam, or the defendant's counsel who was present on Guam to arrange for taking of a deposition of the plaintiff on June 21, 1955.

All of the foregoing was before the Court on August 15, 1955. Counsel for appellant was present and made no attempt to refute them. Can it be said by anyone that the Court's decision was not based on ample evidence?

B. Appellant seems to urge that his failure to proceed in the action below denied him a chance to be heard and this should be blamed on the defendant. A similar argument was raised and refuted in *Olsen v. Muskegan Piston Ring Co.,* 117 Fed. 2d 163, where the Court stated:

> "Appellant urges that such a holding (dismissal with prejudice) deprives him of his day in court and penalizes him for the misconduct of his counsel. The effect of his argument is that he has been deprived of his right to a hearing because he was not granted permission to present his case at a later date than that set for hearing. However, the right to a day in court means not the actual presentation of the case, but the right to be duly cited to appear and be offered an opportunity to be heard . . ."

Obviously, the appellant here had many opportunities to be heard, and his failure to do so can in no way be blamed on appellee.

C. The appellant has attempted to emphasize purported statements by the trial Court which mislead Mr. Russell in some manner. It is to be noted and

remembered that the only evidence that Judge Shriver made any statement is the unsupported, self-serving declaration of the appellant. Assuming for the moment that Judge Shriver made any statements outside of the Court, it would be an aspersion on the Judge's official conduct and on the competence of Russell's counsel in Guam to infer that the statement and the effect of such a statement was not taken under full consideration by the Court and given due weight at the time of the hearing two months later. Appellant makes some contention (appellant's brief page 29) that the case of *Peardon v. Chapman,* 169 Fed. 2d 909, has some bearing on this particular issue. It should be pointed out that in that case the Court *at a hearing* had expressly stated to both parties that the matter would go to trial and no dismissal with prejudice would be granted. This is in distinct contrast to the facts presented here where the District Court of Guam warned the appellant by its order of April 19, 1955, that the appellant would be expected to proceed with his action on August 15, 1955, and to be present or testify by deposition.

D. Appellant has further contended that the period of time between the filing of the action herein and its dismissal was not sufficient to warrant a dismissal with prejudice and cites the case of *Neel v. Barbara,* 136 Fed. 2d 69, in support of that proposition. A careful reading of the case will reveal that the basis of the reversal was that the Court had refused plaintiff permission to introduce *any* evidence of his due diligence at the hearing on the motion to dismiss. We sub-

mit that no such permission was here denied by the District Court of Guam and that plaintiff's counsel was free and did submit all relevant data concerning due diligence (or actually lack thereof) of the plaintiff.

The question of time is a relative one. It would be manifestly unfair, for example, to compare the question of the docket on Guam with that of the District Court for the Southern District of New York where delays up to three years are necessary in order to get an action to trial. Guam is a small island. In its first four years of existence the District Court of Guam had fewer than 75 felony cases and these included a large number in which the Court sat in its dual capacity as the Island Court. There were up to the time of the dismissal of this action no jury trials on Guam, with their additional time requirements. There is no waiting for trial of any action on Guam, as pointed out by Judge Shriver in his letter of August 3, 1955 (Appellant's brief, Appendix C) wherein he stated:

> "It must be remembered that in this jurisdiction where the docket is not crowded this action has been pending for a period of time greatly in excess of the normal action. The defendant as well as the plaintiff is entitled to a speedy disposition of the case".

Other jurisdictions have frequently upheld dismissals in time periods even less than that with which we are here concerned as for example, *Holcomb v. Holcomb* (USCA DC 1954) 209 Fed. 2d 279 where a

period of ten months was involved and in *Sokolin v. Estes* (USCA DC 1942) 131 Fed. 2d 351, which covered a fifteen month period. The Court in the latter case also stated:

> ". . . counsel had three months in which to take the deposition and otherwise prepare for trial, and his failure to do so was responsible for the dismissal".

It is respectfully submitted that the time element is of no particular moment here; that the real issue is whether or not the plaintiff below diligently prosecuted this action; that the lack of a crowded calendar on Guam gave appellant numerous opportunities to further his cause; that all continuances were requested by him; and that appellee herein was entitled to a disposition of his case.

E. Appellant has further contended that there is no support in the record for the essential findings of fact and conclusions of law. Appellant takes issue with the Court's finding that plaintiff was in a financial position to have additional depositions taken. The docket record of the Court will show that plaintiff had taken five depositions on Guam in May of 1954. These it is admitted were not favorable to the plaintiff and it can easily be seen why he would like to have additional depositions. The record will show that the lengthy and expensive deposition of Robert L. Peterson taken in San Francisco on April 15 and 18, 1955, was filed with the Court and before it on August 15, 1955. That deposition will show that the plaintiff was personally present and available for the taking

of his own deposition had he so desired and gave ample basis for the Court's finding that the plaintiff was in a financial position to have his own deposition taken. It should also be pointed out that the Court at this time properly took judicial notice of the fact that plaintiff and his San Francisco counsel had previously filed several actions in California, had served appellee Cunningham with process at a time when he was on a vacation in California, had caused Cunningham considerable expense in the taking of depositions in the Guam case and now intended to dismiss the Guam action with the intention of forcing Cunningham to defend himself in a jurisdiction far removed from the scene of the cause of action and from the witnesses' and the defendant's place of residence.

The finding that the plaintiff was not in the hospital is amply supported both by the memorandum from the Master of the USNS Ainsworth (see transcript of record) and the actual statements by appellee as to his physical condition in appellee's brief on appeal.

The burden rests with the appellant to establish that in granting the motion to dismiss the District Court grossly abused the discretionary power with which it is inherently endowed. It is submitted that a review of the record and even a reading of the appellant's brief discloses no conduct on the part of the trial Court that could in any way be considered an abuse of discretion, and the Court below must be affirmed.

IV. REQUIREMENT OF COST BOND AND ALLOWANCE OF ATTORNEYS' FEES WERE PROPER.

The security for costs required by the District Court of Guam is not an unusual or unconstitutional requirement.

The well settled general rule is that a nonresident plaintiff may be required to put up a bond or other security for costs in accordance with local rules. There is no specific Federal statute governing this matter, but a Federal Court has inherent power to require a nonresident to furnish security for costs and may formulate local rules to deal with this problem.

Caviechi v. Mohawk Manufacturing Co., 27 F. Sup. 981;
Slusher v. Jones, 3 F.R.D. 168;
Fontenout v. Cabot Co., 78 F. Sup. 659.

The granting of costs lies within the sound discretion of the Court. Rule 54(d) of the Federal Rules of Civil Procedure provides that a prevailing party shall be granted costs in all cases unless a statute of the United States or the rules provide otherwise. Costs are not limited to the items specified in 28 USC 1920 but may be supplemented by the Court within its discretion.

It is submitted that the requirement for cost bond and the allowance of costs was proper in the within case.

CONCLUSION.

The record in this case and the emotional arguments propounded by the appellant failed to disclose in any manner that the District Court of Guam abused its inherent judicial power in granting the dismissal with prejudice or in refusing to grant a continuance or motion for dismissal without prejudice. The brief for appellant discloses a complete disregard of the rules of this Court with reference to the requirements for briefs and a failure to indicate any jurisdiction in this Court for the appeal.

The appellee respectfully submits that the appeal should be dismissed for the foregoing reasons or in the alternative that the order of Court appealed from should be affirmed.

Dated, San Francisco, California,
March 19, 1956.

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